No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

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CASES

Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, *cert. denied*, 137 S. Ct. 593 (2016) 11

Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) 5, 6

National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753 (1967) 4, 5

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

MISCELLANEOUS

Alan Rappeport et al., *Europe's Planned Digital Tax Heightens Tensions With U.S.*, N.Y. Times, Mar. 19, 2018 10

BEA, *Initial Estimates Show Digital Economy Accounted for 6.5 Percent of GDP in 2016*, BEA Blog, Mar. 15, 2018 3

Daniel T. Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. Rev. 1423 (2010) 3, 6

David Dean et al., *The Internet Economy in the G-20: The $4.2 Trillion Growth Opportunity* (Boston Consulting Group, Mar. 2012) 3

eBay, *2015 U.S. Small Business Global Growth Report* (2015) 4

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eBay, *Small Online Business Growth Report: Towards an Inclusive Global Economy* (Summer 2017) 5

GAO, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (Nov. 2017) 7, 8

H. Res. 95, 112th Cong. (2011) 11

Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – An Economic Analysis* (Mar. 2018) 8

James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity* (McKinsey Global Institute, Oct. 2011) 4

Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax* (True Simplification of Taxation Coalition 2013) 7

Mark Walsh, *The future of e-commerce: bricks and mortar*, The Guardian, Jan. 30, 2016 13

Matthew C. Le Merle et al., *The Impact of Internet Regulation on Investment* (Fifth Era 2016) 3

Matthias Bauer, *Digital Companies and Their Fair Share of Taxes: Myths and Misconceptions* (ECIPE 2018) 12

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Matthieu Pélissié du Rausas et al., *Internet matters: The Net's sweeping impact on growth, jobs, and prosperity* (McKinsey Global Institute, May 2011) 4

Press Release, Secretary Mnuchin Statement On OECD's Digital Economy Taxation Report, Mar. 16, 2018 10

Press Release, Wyden Statement on Republican Efforts to Include Marketplace Fairness Act in Spending Bill, Mar. 8, 2018 10

Retail Sales Tax Compliance Costs: A National Estimate (PriceWaterhouseCoopers 2006) 7

Should States Require Online Retailers To Collect Sales Tax?, Wall St. J., Nov. 15, 2011 7

United States Census Bureau, Quarterly Summary of State and Local Government Tax Revenue for 2017: Q4, Released Mar. 20, 2018 13

United States Trade Representative, Fact Sheet, Key Barriers to Digital Trade (Mar. 2017) 10

INTEREST OF *AMICUS CURIAE*

The Computer & Communications Industry Association (CCIA) represents over twenty companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than $540 billion in annual revenues.[1] For more than 45 years, CCIA has promoted open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries. CCIA has long been concerned about negative implications for online commerce if the relationship between taxes and physical presence is broken. Maintaining the *Quill* standard, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is essential to online retailers across the country, and the many Internet services they rely on, including CCIA members.

SUMMARY OF ARGUMENT

Departing from established Supreme Court precedent to allow states to engage in extraterritorial taxation would burden Internet services, and the startups and small businesses that rely on them to engage in

[1] No counsel for any party authored this brief in whole or in part and no entity or person made any monetary contribution toward the preparation or submission of this brief. On January 31, 2018 and February 5, 2018, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs. A list of CCIA members is available at https://www.ccianet.org/members.

commerce. The digital economy has thrived under a limited regulatory framework. Changing that in this case would have substantial ramifications for U.S. industry beyond taxation. Despite claims to the contrary, online tools that facilitate regulatory compliance do not fully resolve the burden on small businesses using the Internet to operate nationally that a change in U.S. tax policy would create. Departing from precedent could also have a significant international impact, and encourage protectionist policies abroad. E-commerce retailers do not live a tax-free existence, as they already collect and pay sales tax anywhere they have a physical presence, as well as use taxes in many other jurisdictions. The Court should reject Petitioner's calls to overturn decades of precedent, in contravention of *stare decisis*, and uphold the constitutional principles embodied in *Quill*.

ARGUMENT

I. Extraterritorial Taxation Would Burden Internet Services, and the Startups and Small Businesses That Rely on Them.

A. The Digital Economy Has Thrived Under a Limited Regulatory Framework.

Internet commerce, including online retail, has prospered in the U.S. under existing law. Researchers forecast that this growth will continue, provided these innovation-friendly conditions persist. Estimates released in March 2018 from the Bureau of Economic

Analysis found that from 2006 to 2016, the digital economy grew at an average rate of 5.6% per year, outpacing overall U.S. economic growth of 1.5% per year, with the digital economy accounting for 6.5% of U.S. GDP in 2016.[2] In developed markets, the Internet economy has been projected to be one of the fastest growing sectors, with estimates anticipating that the growth rate will be "far outpacing just about every traditional economic sector, producing both wealth and jobs."[3] In the United States, this growth has been possible under existing regulatory regimes, and changes to taxation rules could have a significant impact on investment and innovation. A 2016 study found that 97% of U.S. investors would be uncomfortable investing in Internet businesses if there were to be tax rules which would make Internet businesses operating overseas subject to double taxation.[4] The Court's bright-line rule on taxation under *Quill* remains important for online retailers.[5]

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[2] BEA, *Initial Estimates Show Digital Economy Accounted for 6.5 Percent of GDP in 2016*, BEA Blog, Mar. 15, 2018, https://blog.bea.gov/2018/03/15/initial-estimates-show-digital-economy-accounted-for-6-5-percent-of-gdp-in-2016/.

[3] David Dean et al., *The Internet Economy in the G-20: The $4.2 Trillion Growth Opportunity* (Boston Consulting Group, Mar. 2012), http://img-stg.bcg.com/The_Internet_Economy_G-20_tcm9-106842.pdf, at 6.

[4] Matthew C. Le Merle et al., *The Impact of Internet Regulation on Investment* (Fifth Era 2016), http://www.fifthera.com/perspectives-blog/2016/1/7/report-the-impact-of-internet-regulations-on-investment, at 91.

[5] Daniel T. Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. Rev.

The Internet has also increased exports, particularly for small to medium-sized enterprises (SMEs). SMEs that heavily utilize the Internet bring in more than double the amount of revenue through exports as a percentage of total sales than those that rarely use the Internet,[6] with 75% of the positive impact of the Internet accruing to traditional industries through efficiency gains and expanded markets.[7] A 2015 study found that 95% of U.S. SMEs that sell products on eBay's online platform exported to foreign markets, in contrast with Census Bureau data finding that less than 5% of businesses in the U.S. export.[8] Data from

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1423, 1446-47 (2010) ("[T]he rationales articulated by the Supreme Court in *Quill* for maintaining such a bright-line rule apply with equal force to today's Internet retailers. It is thus crucial either for the Supreme Court to reaffirm that its bright-line rule, first articulated in *Bellas Hess* and reaffirmed in *Quill*, remains good law and applies to Internet retailers, or for Congress to pass uniform, national legislation regulating taxation of Internet retailers. Without such assurance, the area of Internet taxation will remain complicated and unclear.").

[6] James Manyika & Charles Roxburgh, *The great transformer: The impact of the Internet on economic growth and prosperity* (McKinsey Global Institute, Oct. 2011), https://www.mckinsey.com/~/media/McKinsey/Industries/High%20Tech/Our%20Insights/The%20great%20transformer/MGI_Impact_of_Internet_on_economic_growth.ashx, at 6.

[7] Matthieu Pélissié du Rausas et al., *Internet matters: The Net's sweeping impact on growth, jobs, and prosperity* (McKinsey Global Institute, May 2011), https://www.mckinsey.com/~/media/McKinsey/Industries/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_full_report.ashx.

[8] eBay, *2015 U.S. Small Business Global Growth Report* (2015), https://www.ebaymainstreet.com/sites/default/files/2015-us-small-biz-global-growth-report_0.pdf, at 6.

2017 found that the export rates of "micro, small and medium-sized enterprises" engaged in technology-enabled commerce exceeded traditional businesses by at least fourfold.[9] Inviting taxation of these small businesses abroad could have dramatic repercussions on U.S. exports.

While the Internet may be revolutionary in many ways, its existence does not change basic principles about the scope of taxation and the requirement for a physical presence, nor does it nullify precedents preceding the Internet. The Internet is the latest technological development in facilitating commerce, but the same principles that first applied to catalog mail orders and later orders via telephone, now apply to orders via websites.

Just as the Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), followed *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), providing businesses and consumers with a bright-line, physical-presence requirement,[10] the Court should do the same in this case. Petitioner has not demonstrated a "special justification," *see Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (citation omitted), to justify the extraordinary act of abandoning precedent to change the requirement for a physical presence discussed in *Bellas Hess* and upheld in

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[9] eBay, *Small Online Business Growth Report: Towards an Inclusive Global Economy* (Summer 2017), https://www.ebaymainstreet.com/sites/default/files/ebay_global-report_0.pdf, at 9.

[10] *Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992).

Quill. Similarly, the Court's clear interpretation of the Commerce Clause and the due process considerations in these cases remains sound.

Stare decisis is "a foundation stone of the rule of law." *Kimble*, 135 S. Ct. at 2409 (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). As Justice Scalia noted in *Quill*, *stare decisis* has a "special force" where Congress "remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). In the more than two dozen years since *Quill*, Congress has not chosen to overturn the ruling, and so the Court's dormant Commerce Clause interpretation remains undisturbed.[11]

B. Online Tools That Facilitate Tax Compliance Do Not Fully Resolve the Burden on Small Businesses Using the Internet to Operate Nationally.

While software tools exist to facilitate tax compliance, acquiring a software program does not alone accomplish compliance. Ultimately, small businesses

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[11] Daniel T. Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. Rev. 1423, 1445 (2010) ("[T]he *Quill* Court itself believed that interstate taxation of mail-order companies (or Internet retailers) was a matter better resolved in the halls of Congress. Under dormant Commerce Clause jurisprudence, Congress always remains free to disagree with the Court and 'overrule' cases by passing national legislation.").

could spend, according to a 2013 study, as much as $80,000 to $290,000 for setup and integration costs, with annual costs of $57,500 to $260,000 for maintenance, updates, audits and service fees,[12] to document what may be "only 0.5% of total state and local tax revenue"[13] – much of which is already being collected.[14]

Proponents of abandoning the *Quill* precedent have cited fairness as a rationale for rejecting the physical presence rule. Even assuming that this is the proper yardstick, regulations are only fair if they apply to all firms equally. Yet abandoning the physical presence requirement would put online retailers in a very different position than brick-and-mortar stores, compelled to procure services or software solutions to manage tax and regulatory compliance for users in 45 states and the District of Columbia, and thousands of different tax regimes. Brick-and-mortar retail stores,

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[12] Larry Kavanagh & Al Bessin, *The Real-World Challenges in Collecting Multi-State Sales Tax* (True Simplification of Taxation Coalition 2013), http://truesimplification.org/wp-content/uploads/Final_TruST-COI-Paper-.pdf, at 2; *see also Retail Sales Tax Compliance Costs: A National Estimate* (PriceWaterhouseCoopers 2006), http://netchoice.org/wp-content/uploads/cost-of-collection-study-sstp.pdf, at E-3, E-4 (listing additional compliance costs).

[13] *Should States Require Online Retailers To Collect Sales Tax?*, Wall St. J., Nov. 15, 2011, https://www.wsj.com/articles/SB10001424052970204528204577007511298359048.

[14] GAO, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs (Nov. 2017), https://www.gao.gov/assets/690/688437.pdf, at 41-42 (estimating high collection rates for online retailers: 78-86% overall, and 87-96% for the top 100 online retailers).

on the other hand, must comply only with the taxing jurisdiction where they are located, regardless of where their customers may travel from. It is hardly self evident that fairness dictates that an online merchant serving ten customers spread across ten jurisdictions should have ten times the compliance obligations as a brick-and-mortar merchant with ten customers in one jurisdiction.

A recent GAO report discussed additional costs for businesses if they were to be regulated by additional states and tax jurisdictions – including the cost of having to understand new compliance obligations in various states and tax jurisdictions.[15] Compliance costs could also limit competition by serving as a barrier to entry for small businesses.[16]

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[15] *Id.* at 22 ("The related liability cost increases along with an increase in exposure to more tax jurisdictions. These costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions.").

[16] Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – An Economic Analysis* (Mar. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948, at 24 ("Needless to say, these compliance costs alone may be absolutely prohibitive for a small retailing enterprise that is just about to launch its operations. Existing small remote retailers may consequently decide to exit the market altogether, or limit themselves to serving only very specific tax jurisdictions.").

II. Departing from Precedent Could Have a Significant International Impact, and Encourage Protectionist Policies Abroad.

The impact of this case will be felt well beyond the realm of taxation, having broad ramifications for American companies globally. Not only would extraterritorial taxation have a significant impact on Internet companies, it may invite policymakers to impose other regulations of interstate commerce on online businesses in the guise of taxation, across the country and around the world.

The magnitude of businesses that would be burdened by a change in the established rule is likely to go far beyond online businesses. This impact will be felt on small businesses in particular, which rely on the Internet to engage in commerce. Maintaining an online presence is important for small businesses of a wide variety of industries to engage in commerce. Merely operating with a web presence, whether self-hosted or on an online platform like WordPress, Tumblr, or Etsy, should not expose a business to regulation in every jurisdiction where that presence is visible.

This is particularly salient as changes in U.S. policy may have international ramifications. U.S. businesses, especially small to medium-sized enterprises, face a rising tide of protectionism abroad, as legislatures implement regulations which disproportionately

impact U.S. companies.[17] State and localities' efforts to tax e-commerce businesses could encourage international regulators to engage in similar practices. Indeed, the European Commission is considering a new revenue tax on digital companies,[18] about which the U.S. Treasury Secretary recently expressed concern.[19]

Congress is best positioned to address the international ramifications of any potential policy changes, and has been engaged on issues of online taxation. In March 2018, Senator Ron Wyden, Ranking Member on the Senate Committee on Finance, noted that Congress recently enacted legislation, making the Internet Tax Freedom Act permanent just two years ago.[20]

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[17] *See* United States Trade Representative, Fact Sheet, Key Barriers to Digital Trade (Mar. 2017), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2017/march/key-barriers-digital-trade ("[I]n recent years, many governments have sought to control digital trade in blunt and disruptive ways. Some of these government actions are explicitly protectionist; others have imposed unnecessary burdens on digital trade while seeking to address legitimate public policy goals.").

[18] Alan Rappeport et al., *Europe's Planned Digital Tax Heightens Tensions With U.S.*, N.Y. Times, Mar. 19, 2018, https://www.nytimes.com/2018/03/19/us/politics/europe-digital-tax-trade.html.

[19] Press Release, Secretary Mnuchin Statement On OECD's Digital Economy Taxation Report, Mar. 16, 2018, https://home.treasury.gov/news/press-releases/sm0316 ("The U.S. firmly opposes proposals by any country to single out digital companies. Some of these companies are among the greatest contributors to U.S. job creation and economic growth. Imposing new and redundant tax burdens would inhibit growth and ultimately harm workers and consumers.").

[20] Press Release, Wyden Statement on Republican Efforts to Include Marketplace Fairness Act in Spending Bill, Mar. 8, 2018,

Seventeen members of Congress introduced a resolution several years ago against "grant[ing] State governments the authority to impose any new burdensome or unfair tax collecting requirements on small online businesses and entrepreneurs, which would ultimately hurt the economy and consumers in the United States."[21] This is hardly evidence of Congressional inactivity.

In *Quill*, this Court wrote that "the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions." *Quill*, 504 U.S. at 318. As then-Judge Gorsuch noted, "judges distinguish themselves from politicians by the oath they take to apply the law as it is, not to reshape the law as they wish it to be." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147-48 (Gorsuch, J.), *cert. denied*, 137 S. Ct. 593 (2016).

III. E-Commerce Retailers Do Not Live a Tax-Free Existence.

Any change to tax law and policy that would affect companies across the U.S. economy should be based on empirical evidence. The Court in *Quill* reiterated that

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https://www.finance.senate.gov/ranking-members-news/wyden-statement-on-republican-efforts-to-include-marketplace-fairness-act-in-spending-bill-.

[21] H. Res. 95, 112th Cong. (2011).

"the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312. Research published earlier this year by the European Centre for International Political Economy (ECIPE) found that digital companies in fact pay a higher effective corporate tax rate than traditional companies. Digital companies have real effective corporate tax rates many times higher than the European Commission's estimated 8.9%, paying in actuality average rates between 26.8% and 29.4%.[22]

The notion that Internet businesses are untaxed is simply wrong. U.S. companies, including online retailers, collect sales tax in every state where they have a physical presence. Buyers are compelled to pay tax in the form of use tax and sales tax. Remedying difficulties associated with collecting these taxes does not require overturning decades of Supreme Court precedent interpreting the Commerce Clause. In fact, states' lack of investment in taxpayer education on consumer use tax collection may suggest that the amount which states stand to collect may be inconsequential. Furthermore, states are hardly struggling to collect taxes, and saw "significant increases" in tax revenue in the

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[22] Matthias Bauer, *Digital Companies and Their Fair Share of Taxes: Myths and Misconceptions* (ECIPE 2018), http://ecipe.org//app/uploads/2018/02/ECI_18_OccasionalPaper_Taxing_3_2018_LY08.pdf, at 8.

fourth quarter of 2017, according to recently-released data from the U.S. Census Bureau.[23]

Finally, Internet companies are not shielded from state taxation if they open brick-and-mortar stores. Online retailers open brick-and-mortar locations with increasing regularity.[24] In doing so, and availing themselves of the services and infrastructure of a locality, these companies would clearly be considered to have a physical presence in those locations, and thus would be subject to taxation by the jurisdictions in which their stores exist.

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[23] United States Census Bureau, Quarterly Summary of State and Local Government Tax Revenue for 2017: Q4, Released Mar. 20, 2018, https://www.census.gov/content/dam/Census/library/publications/2017/econ/g17-qtax4.pdf.

[24] Mark Walsh, *The future of e-commerce: bricks and mortar*, The Guardian, Jan. 30, 2016, https://www.theguardian.com/business/2016/jan/30/future-of-e-commerce-bricks-and-mortar.

CONCLUSION

For the foregoing reasons, the Court should reject Petitioner's calls to overturn decades of precedent, in contravention of *stare decisis*, and uphold the constitutional principles embodied in *Quill*.

Respectfully submitted,

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